IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 359/2005

1. Shri Oberlino Cirilo Sanches,
   major in age, landowner,
   r/o. H.No. 1052, Vaddem,
   Merces, Vasco da Gama, Goa.

2. Shri Richard Sanches,
   r/o. H.No. 1052, Vaddem,
   Merces, Vasco da Gama, Goa.

3. Shri Jose Fernandes,
   r/o. H.No.1052, Vaddem,
   Merces,
   Vasco da Gama, Goa. ..... Petitioners.

V/s.

1. Shri Momento Vaz,
   major in age, service,
   and his wife,

2. Smt. Ony Brigid alias Ony Vaz,
   daughter of late Lorgio Andre
   F.X. Rodrigues,
   major in age, housewife,
   both r/o. Vadem, Mormugao,
   Taluka Goa. ..... Respondents.

Shri A.F. Diniz, Advocate for the petitioners.

Shri Marcelino C. Fernandes, Advocate for the respondents.

CORAM : R.M.S. KHANDEPARKAR, J.

DATE : 27TH JANUARY, 2006.

ORAL JUDGMENT :

Heard. Rule. By consent, the Rule is made returnable forthwith. Mr. Fernandes waives service for the respondents. The petitioners challenge the order dated 30.7.2005 passed in Regular Civil Suit No.21/2001/D by the Civil Judge, Senior Division, at Vasco da Gama. By the impugned order, the trial Court has allowed the application filed by the respondents under Order VIII, Rule 6-C of C.P.C. for exclusion of the counter claim which was filed by the petitioners. The exclusion of the counter claim has been ordered on the ground that the petitioners have sought to add new parties and the pleadings in the plaint disclose a new cause of action and, therefore, the same is held to be not permissible in the form of the counter claim and therefore, the counter claim was ordered to be excluded. While assailing the impugned order, the learned Advocate for the petitioners referring to Rules 15 onwards of Order VIII of C.P.C. has submitted that the Court below totally ignored the provisions comprised in those Rules which do not permit exclusion of the counter claim merely on the ground of addition of new parties or on the ground that the counter claim discloses a new cause of action.

3. On the other hand, the learned Counsel for the respondents has submitted that the counter claim has been rightly excluded in exercise of power under Order VIII, Rule 6-C and, therefore, no fault can be found with the impugned order.

4. The provisions relating to counter claim comprised under Rule 6A onwards in Order VIII apparently disclose that a counter claim can be filed in relation to a cause of action accrued in favour of the defendant either before or after the filing of the suit. A counter claim can obviously refer to a cause of action different from the one arisen in favour of the plaintiff for filing the suit and being so, merely because new cause of action is revealed from the pleadings in the counter claim, it cannot be excluded, unless the trial Court comes to a clear finding that the pleadings sought to be introduced in that regard would either result in embarrassing the fair trial of the case or it would warrant an independent suit in relation to the matter included in the counter claim.

5. As regards addition of the parties i.e. the parties who are not arrayed as the parties to the suit by the plaintiffs, the Rule 15 clearly permits addition of such parties in the course of filing of the counter claim.

6. For the reasons stated above, therefore, exclusion of the counter claim merely on the ground of addition of new parties or disclosure of a new cause of action is not permissible. In the circumstances, the impugned order apparently discloses failure of exercise of power under Rule 6-C of Order VIII by the trial Court, as also failure on the part of the trial Court to ascertain the occasion

for exercise of such power vis a vis after taking into consideration the pleadings in the counter claim. The Court below without applying its mind to the provisions of law relating to the rights of the parties pertaining to the counter claim and ignoring the provisions of Order VIII, Rule 15 onwards has ordered the exclusion of the counter claim and, therefore, has clearly acted illegally rendering the impugned order to be bad in law.

7. For the reasons stated above, therefore, the petition succeeds. The impugned order is, hereby quashed and set aside and the application filed by the Petitioners under Order VIII, Rule 6-C of C.P.C. is, hereby, dismissed. Rule is made absolute in above terms. No order as to costs.

R.M.S. KHANDEPARKAR, J.

ssm.